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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

MAY 1998

In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996 Amendment of the Commission's Rules and Policies Governing Pole Attachments	CS Docket No. 97-151

JOINT REPLY

The Texas Cable & Telecommunications Association, Cable Telecommunications Association of Maryland, Delaware & District of Columbia, Mid-America Cable Telecommunications Association, Jones Intercable, Inc., Greater Media, Inc., Helicon, Inc., Rifkin & Associates (collectively "Joint Cable Parties") respectfully submit these Joint Reply Comments on the Oppositions/Comments of SBC Corp., Bell Atlantic Corp., EEI/UTC, Texas Utilities Electric Co., GTE, MCI, Ameritech, and BellSouth opposing the Petition for Reconsideration filed by the National Cable Television Association ("NCTA").

I. THE COMMISSION SHOULD REJECT UTILITY PLEAS TO OVERTURN THE FCC'S JURISDICTION OVER ATTACHMENTS USED FOR DARK FIBER AND INTERNET ACCESS AND SHOULD NOT MODIFY THE FEBRUARY 6 ORDER

The utilities advance arguments that Internet and dark fiber are outside of the FCC's jurisdiction. For example, TU Electric claims that because Internet and dark fiber services do not fall within its strained definitions of services, they are completely unprotected by pole regulation.[1] Others claim that Internet-related services are telecommunications and thus subject to the higher attachment rate.[2] Congress placed pole regulation in the core of FCC's jurisdiction to overturn a

[1] TU Electric Comments at 4-5.

[2] *See, e.g.*, Bell Atlantic Comments at 2-6; SBC Comments at 20-22.

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narrow jurisdictional interpretation in *California Water*,[3] not to perpetuate it. The 1978 Pole Act was designed to remedy the pole bottleneck that pole owners had abused and placed the regulation of this essential resource squarely before the FCC or certified state agencies. The 1996 Act, in addition to explicitly extending the Section 224 remedy to providers of telecommunications services, fundamentally seeks to cultivate (a) vibrant and innovative communications services from multiple new providers and (b) wider availability of advanced networks and service.

Accordingly, the Pole Act, including the 1996 amendments, must be broadly construed as a remedial statute expressly addressing the chronic problem of utility monopolization of the pole resource, and preventing utilities from substituting anticompetitive tactics for marketplace innovation. The 1996 amendments did not constrain the FCC's regulation of pole attachments. To the contrary, Congress expanded *Heritage*[4] to benefit all competitive telecommunications carriers, and provided for a phase in of a higher rate, on a graduated schedule to assure that a sudden rate spike would not deter deployment or diversification. The pole owners seek to transform the Act, which authorizes strict regulation and precisely administered price controls where private negotiations fail, into a deregulated monopoly-dominated free-for-all, antithetical to the 1978 Act and the 1996 amendments.

The utilities' narrow view is not authorized by the plain language of the statute.[5] As a legal matter, high-speed cable television Internet access is not "telecommunications" within the pole attachment context. Indeed, Congress amended the Act to steer Internet access away from

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[3] *California Water and Tel. Co.*, 40 F.C.C.2d 1138 (1973).

[4] *Heritage Cablevision Assocs. of Dallas, L.P. v. Texas Utils. Elec. Co.*, 6 F.C.C.R. 7099 (1991), *aff'd sub nom., Texas Utils. Elec. Co. v. FCC*, 997 F.2d 925 (D.C. Cir. 1993).

[5] *See, e.g.*, Rulemaking Comments of Comcast Cablevision, *et al.* at 18-20.

being classified as telecommunications services.[6] Provision of dark fiber and Internet-related services should be treated exactly as the Commission has decided in the February 6 Order, and should not either be handicapped by competitors or reconsidered to enrich utility pole owners at the expense of competitive facilities deployment and public use.

II. "UNUSABLE SPACE" SHOULD BE ALLOCATED AS SHOWN IN THE NCTA'S PETITION FOR RECONSIDERATION AND IN THE OPPOSITION OF THE JOINT PARTIES

A. Counting Entities

"Unusable space" should be allocated among all users of pole space: electric utilities; electric utilities with internal communications services; ILECs; ILECs providing video services; cable operators; CLECs; and governmental attachments. This result is not only required by a plain reading of the statute and the legislative history, and, by practical field reality, but to prevent pole owners from penalizing their telecommunications competitors.

First, the utilities seek to eliminate all entities to be allocated a share of unusable space in order to drive up the rates of their likeliest competitors: cable operators diversifying into telecommunications and facilities-based CLECs. They seek to reduce—to a universe of one—the number of parties on a pole when Congress intended that all attaching parties share the unusable pole space. On its face, the Act does not allow the spurious exclusions that the utilities seek.

Each of these parties attaches to and benefits from the pole, the electric utilities disproportionately so. Each is an "entity" as defined under the statute, as has been shown time and again in this proceeding.[7] We demonstrated how the utilities' efforts to exclude all but the first

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[6] *See, e.g.,* Cong. Rec. of January 31, 1996, at H1123. This definition was to "reflect the evolution of cable to include interactive services such as game channels and *information services* made available to subscribers by the cable operator, as well as *enhanced services*. This amendment is not intended to affect Federal or State regulation of telecommunications service offered through cable system facilities, or to cause dial-up access to information services over telephone lines to be classified as a cable service." *Id.* (emphasis added).

[7] *See, e.g,* Joint Parties' Joint Opposition to Petitions for Reconsideration at 4-6 (filed May 12, 1998).

CLEC or first diversifying cable operator would be forced to pay a $30.00 per pole attachment rate. Rather than attempting to disprove the empirics behind this showing, or even assert that it is somehow incorrect, the utilities only attempt to obfuscate it. For example, EEI/UTC claim that joint pole ownership contracts (which the FCC does not control) already require electric companies to pay a disproportionate amount of the costs deployed.[8] They argue that requiring electrics to be counted as attaching entities would require electrics to further "subsidize" poles. If it is true that electrics have greater pole ownership than previously, electrics have done so voluntarily because of their greater needs for space and/or the strategic advantages they perceive in controlling this essential facility. It is no justification to shift those costs to the electrics' competitors. In any case, if the Commission gave credence to these claims, the telecommunications rental rate would be essentially exempt from the very regulation Congress intended. This would contradict the clear dictates of the statute that this space be shared among attaching entities, and effectively reverse the course set by the 1978 Act and 20 years of (repeatedly validated) pole regulation.

On a related point, SBC attacks NCTA's showing in its Petition for Reconsideration that electric utilities with internal communications attachments should be treated as an attaching entity, to harmonize with the Commission's ruling in the *Local Competition Order*, 11 FCC Rcd 15499 ¶ 1174 (Aug. 8, 1996).[9] SBC's attacks are misplaced. It offers no reasons not to adopt NCTA's entity counting proposal in a manner consistent with its prior pro-competitive orders relative to pole use and cost allocation. Entities should be counted in a way harmonious with opening up the local exchange bottleneck to facilities-based competitors, exactly as the interconnection and checklist requirements of Sections 251 and 271 aim to do.[10] Had Congress

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[8] EEI/UTC Comments at 8.

[9] SBC Comments at 16, n. 42.

[10] 47 U.S.C. §§ 251 and 271.

intended the result that the utilities claim here, it either would have declined to extend pole-rate regulation to telecommunications attachments, or, specifically stated that the telecommunications newcomer would pay all unusable space costs either in the text of the Act itself or *somewhere* in the legislative history.[11] That Congress did not do so is the best evidence that the utilities have manufactured their theories out of whole cloth.

B. Development of Presumptions

The Commission has required utility pole owners to develop presumptions on the number of entities attached to their poles according to Census designation for urban, urbanized and rural areas. These designations are to be used only to determine in each of these zones the presumptive number of parties attaching to the pole, not to disaggregate the reporting entity's poles costs as has been suggested.[12] Such disaggregation would undermine the Commission's long-standing precedent of requiring utility pole owners to base their pole rates on publicly filed data.

In opposing the Commission's finding, and the petitions for reconsideration seeking refinements to the finding, pole owners claim an inability to develop these presumptions. Ameritech, EEI/UTC and SBC are among those arguing that "difficulties" in following the Commission's directive to follow Census designations requires the reconsideration of that directive and pole owner "flexibility" to develop their own presumptions. In truth, pole owners know perfectly well how to zero in on the characteristics of discrete network sectors to perform zone-density pricing studies when it suits them. It only becomes impossible when such focus would facilitate CLEC entry into urban areas, the areas into which independent CLECs are most likely to

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[11] The Joint Parties agree with Sprint's suggestion that government entities must be counted as attaching entities whether or not these networks today are used for commercial common carrier telecommunications or cable television services. As Sprint points out, this suggestion (advocated by SBC) would provide an untoward advantage to the ILEC pole owner by allowing pole owners to recover the costs of government pole space from its competitors, thereby subsidizing the ILECs' efforts to provide competitive services to government entities. Sprint Comments at 2-3.

[12] MCI Comments at 6.

seek a toehold.[13] Utilities have at their disposal not only contracts and lists of all the parties that attach to their poles, but network maps showing the precise routes, and in many cases, the precise poles, to which these parties are attached. Moreover, a comparatively few number of utility employees even in the largest multi-state electric and telephone utilities are responsible for coordinating joint pole and conduit use, and know who and what is on their poles. The utilities offer no reason why paper records, CAD files, and employee knowledge cannot be converted into zone-specific presumptions.

Pole owners such as GTE invoke the specter of higher pole rates in rural areas when presumptions are developed across the three Census zones.[14] GTE's remedy is to average four- and five-party poles with primarily rural two-party poles to yield a state-wide "average." This proposal is sleight-of-hand intended to create price barriers to entry.

Utilities and attaching parties already have the reciprocal obligation to negotiate in good faith. If any pole owner actually encounters difficulty in developing the presumptions, they should contact and negotiate with the state cable association or with CLEC industry associations such as ALTS to seek cross-industry resolution (as many do on pole rates and contracts today). If this cooperative effort fails to find a solution, either side can seek relief in a specific case at the FCC. No evidence has been advanced that the scheme is unworkable. All utility effort on this point to date has been directed at reversing the Commission's directive to develop presumptions, not at attempting to follow it.

Finally, if the Commission concludes, ultimately, that its proposal is unworkable (which we posit would be the result of continued utility resistance rather than good-faith efforts at

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[13] *See, e.g.,* SBC Comments at 1-4.

[14] *See, e.g.,* GTE Comments at 6.

implementation), the Commission, as NCTA and others advocated at rulemaking, should itself adopt the presumptions.

III. THE COMMISSION SHOULD REJECT UTILITY POSITIONS ON CONDUIT PRICING

Extending their massive resistance to price control of essential facility access, the utilities' oppositions continue to demonstrate that the Commission's initial approach to "unusable" conduit space costs requires reworking. SBC claims again that only the costs of duct material should be considered usable and all other space should be deemed unusable.[15] It claims, further, that methods exist for estimating unusable conduit space costs.[16] Bell Atlantic simply guesses that 50% of its conduit network costs are attributable to unusable space.[17]

If the Commission were obligated to regulate only one conduit run between two manholes; if all conduit networks under its jurisdiction were identical; if telephone and electric utility booked "unusable space" costs to publicly filed accounts; or if enormous amounts of downtown conduit networks essential to the provision of competitive alternatives were not built in the first half of this century, utility offers of cross sectional views and utility construction invoices might have meaning. But conduit/duct network configurations come in many more permutations than bare poles (which are distinguished only in height class (thickness) and in some cases materials), making the concept of unusable conduit space, as has been shown by the cable industry, to be unworkable.

Not one utility has submitted hard data showing that reliable unusable space cost studies can be derived even from internal utility data which the Commission consistently has

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[15] SBC Comments at 7.

[16] *Id.* at 6.

[17] Bell Atlantic Comments at 7.

eschewed. Bell Atlantic's "estimate" that 50% of its conduit costs are unusable is based on nothing.[18] SBC for its part argues that the utility can produce invoices to demonstrate its "unusable space costs."[19] SBC fails to mention, however, that in the only conduit case that this Commission has adjudicated to date concerning rate and access terms (in Wichita, Kansas), portions of the conduit network were more than 80 years old, and that SBC's records only showed full depreciation.[20] We doubt that SBC has access to those original construction invoices, or that other utilities can produce meaningful cost support for their claims of unusable space costs.

The most that could be deemed "presumptively" unusable would be one-half duct "reserved" for maintenance space, to conform with the Multimedia decision and the half-duct convention.

In a final bid to resuscitate reproduction-cost pricing for conduits, and reverse the half-duct convention, EEI/UTC argue that while poles depreciate over time, that the "value" of conduit has appreciated.[21] Utilities, however, have been charging ratepayers for depreciation expense every year and enjoying the benefits from such charges from the moment that the assets are installed. The Commission cannot now reverse course and allow the utility to ignore in conduit rents the depreciation credits that it has accrued over the life of its conduit assets, all in service of a fictional valuation methodology intended to prohibit conduit entity.

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[18] Bell Atlantic Comments at 6-7.

[19] SBC Comments at 8.

[20] *Multimedia Cablevision, Inc. v. Southwestern Bell Telephone Co., Inc.*, 11 FCC Rcd. 11202 (1996)

[21] EEI/UTC Comments at 13.

IV. THE COMMISSION SHOULD REJECT UTILITY PLEAS TO CHANGE THE ORDERS RULINGS ON OVERLASHING

TU Electric argues that the Commission's overlashing findings will invite gamesmanship and abuses.[22] SBC argues that overlashing decisions should be left to the pole owner.[23] Bell Atlantic argues that overlashing should only be permitted upon advance notice to the pole owner.[24] Here again the utilities seek to overturn the Commission's pro-competitive overlashing ruling, but offer only argument. They seek to collect surcharges for attachments that consume no more space and create no additional pole-owner cost. No pole owner has produced evidence to dispute that overlashing is performed exactly as NCTA and the Joint Parties have demonstrated.[25] It has been settled since *Heritage* that overlashing does not consume more pole space. Whatever concerns there may be about facilities identification,[26] individual problems can be addressed at the field level, or in the worst case at the FCC. The very utilities raising these concerns have proven themselves to be less that disinterested trustees of the pole resource.

The utilities have secured eligible telecommunications company ("ETC") status from the Commission. They are investors in wireless telecommunications ventures and seek to exclude all non-affiliated wireless companies from their poles and support structures. They look to telecommunications as a diversification play to combat competition in their core service markets.[27]

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[22] TU Electric Comments at 5-6.

[23] SBC Comments at 19-20.

[24] Bell Atlantic Comments at 8.

[25] *See, e.g.,* Joint Parties' Joint Opposition to Petitions for Reconsideration at 9-10.

[26] *See, e.g.,* TU Electric Comments at 6.

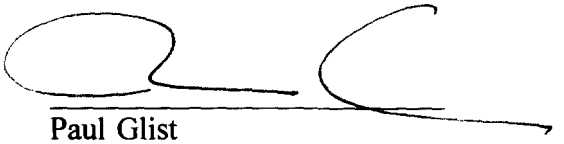
[27] The Commission need look no farther than the PEPCO/RCN Starpower joint venture entering the Washington, D.C. area for but one example of this seismic electric industry shift.

It is no wonder they would seek to leverage the poles to handicap their competitors. But it is all the more reason for the Commission to adhere to its prior rulings.

V. CONCLUSION

For these reasons, the Joint Parties respectfully request that the Commission reconsider its February 6 Order only in a manner consistent with the Petition for Reconsideration submitted by NCTA, and the subsequent submissions of the Joint Parties and NCTA in this docket.

Texas Cable & Telecommunications Association; Cable Telecommunications Association of Maryland, Delaware & District of Columbia; Mid-America Cable Telecommunications Association; Jones Intercable, Inc.; Greater Media, Inc.; Helicon, Inc.; Rifkin & Associates



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May 28, 1998

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